IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8552 OF 2006

MONISHA TRIPLEX BUNGLOW .. Petitioners
(Orig. Opponent)

Versus

HARIRAM AGARWAL .. Respondent
(Orig. Disputant)

Mr. Narulla for the Petitioners
Mr. Vijay D. Patil for the Respondent

CORAM : S.R. SATHE,J.
DATED : 24/07/2007

ORAL JUDGEMENT :-

1. Rule, returnable forthwith. By consent of both the learned Advocates matter is heard finally.

2. This Writ Petition takes exception to the judgement and order passed by the President, Maharashtra Co-operative Appellate Court Mumbai in Appeal No.66 of 2006 whereby the order passed by the Co-operative Court No.4, Mumbai directing the present Petitioner Co-operative Society to refund the amount of Rs.4,07,500/- to the Respondent was confirmed and the society was also directed to pay interest @ of Rs.6% per annum from the date of dispute till realization.

3. The brief facts giving rise to this Petition are as under :-

The Petitioner is a tenant co-partnership housing society registered in the year 1992. The present Respondent purchased units Nos.A-6/1, A-6/2 and A-6/3 in Triplex Bunglow under an agreement of sale dated 09/06/1998 executed with Mrs. Madhuri R. Shankar, for Unit Nos.I and II, and with Mr. Rajaram N. Shankar, for Unit No.III. At the time of transfer of above units in the name of the Respondent, the Petitioner-society recovered transfer premium. However, subsequently the Respondent-original disputant claimed that the Petitioner-society has recovered an excess amount towards transfer premium and it was contrary to the provisions of the Act and Bye-laws and the circular issued by the Commissioner for Co-operation. The disputant, therefore, filed case No. CC/IV/514/2001 before the 4th Co-operative Court, Mumbai alleging that the Society has recovered illegal excess premium towards the Transfer fee and as such the society be directed to refund the same to the disputant.

4. The society filed Written Statement and opposed the claim made by the Disputant. They contended that whatever amount was collected from the disputant was not only towards transfer of units but it was also for protecting the disputant to have an exclusive use of

open space in front of the said units. Besides this, the society permitted the disputant to make beautification of the open area, park their cars as well as to have a garden for their exclusive use and enjoyment. According to Society, they were entitled to recover such amount. Hence, they prayed that disputant's claim be rejected.

5. Both the parties adduced oral and documentary evidence. After considering the said evidence the learned Co-operative Judge came to the conclusion that the Petitioner-society has claimed excess amount of Rs.2,70,000/- and Rs.1,37,500/- illegally and against the circular issued by the Commissioner for Co-operation. He, therefore, directed the Petitioner-society to return the said amount to disputant alongwith interest @ 21% from 09/06/1998 till actual realization.

6. Being aggrieved by the said order society filed appeal No.66 of 2006 before the Maharashtra State Co-operative Appellate Court. After hearing the arguments of both the learned Advocates the Appellate Court also found that the society had illegally recovered excess amount by way of transfer premium. The Appellate Court,

therefore, confirmed the order directing the society to refund the excess amount. He, however, modified the order with regard to interest and directed the Society to pay 6% interest instead of 21%.

7. The above mentioned order is being challenged in the present Petition.

8. Shri Narulla, learned Advocate for the Petitioner submitted that the amount that was recovered from the disputant was not only towards transfer premium but it was also for allowing the disputant to use the additional open space in front of the respective units and permitting the disputant to carry out certain major repairs. He also submitted that Society was entitled for such amount and moreover, the disputant had paid the same voluntarily and the society has even filed resolution to that effect. He, therefore, canvassed before me that now it is not open for the disputant to allege that extra premium for transfer has been recovered. He, therefore, submitted that Petition be allowed and the orders passed by the Courts below be set aside.

9. As against this, Shri Vijay Patil, learned

Advocate for the present Respondent-original disputant submitted that at the relevant time Petitioner-society was not ready to issue transfer certificate. So, under such circumstances, he was constrained to pay the additional amount and it was certainly not voluntary payment. According to him, even as per the Bye-laws of the Co-operative Housing Society, Society was not entitled to recover any amount by way of donation or contribution towards any other purpose under the guise of premium for transfer of unit and share certificates. He, therefore, submitted that the orders passed by the Maharashtra State Co-operative Court is legal and valid and there is no need to interfere with the same.

10. From the pleadings of the parties and the submissions made before me, it is crystal clear that the Petitioner-society has not recovered the transfer premium as per rules, Bye-laws and the circulars issued by the Commissioner for Co-operation and Registrar for Co-operative Societies. But they have in fact recovered much excess amount. The only question is whether the said extra amount i.e. collected from the disputant was voluntary and whether it was in fact for giving any extra facility to the disputant. Both the Courts below have in fact recorded concurrent finding of fact that

extra transfer premium has been recovered from the disputant. They have not upheld the contention of the society that the extra premium that was recovered was towards extra facility and that the said payment was made voluntarily by the disputant. So, the said question of fact can not be considered in this Petition.

11. Shri Narulla, learned Advocate for the present Petitioner submitted that Society has in fact passed resolution wherein also it is stated that such amount has been recovered from the disputant as he was given extra facility of using open space adjoining to above mentioned three units. Ofcourse, he has fairly submitted that if only rules, Bye-laws and circulars issued by the Commissioner for Co-operation and Registrar for Co-operative Societies are considered then the amount recovered is more than the prescribed rate of transfer premium. So, when such is the position the Petitioner-society is in fact legally bound to return the excess amount recovered towards transfer premium.

12. A feeble attempt has been made by the Society to show that the extra amount recovered was towards the

facility granted to the disputant and it was voluntary payment. However, society's own admission in their Written Statement gives a death blow to this contention. In paragraph-3 of their Written Statement. It is mentioned :-

> " It is true that the opponent society has collected transfer premium of Rs.3,45,000/- for the said three units"

13. If really the amount recovered was towards the transfer premium and other charges then the Society would not have said that they have collected transfer premium of Rs. 3,45,000/-. As against this, the disputant has fairly submitted that as the Society was not ready to give no objection for transfer, such extra payment was made but it was not voluntary. The question arises, whether the contention of the society that the extra amount was recovered towards extra facility or additional rights that were given to the disputant is correct. While considering this aspect, if we see the resolution that is passed by the Society then also we find that no actual additional rights were in fact given to the disputant for his extra payment. If really such rights would have been given by the society to disputant then certainly they would not have put the

following condition:

> "The Society will not levy any charges for exclusive use of open space. However, the member can not deal with, dispose of the said open space or open areas while disposing of the bungalow/ units. The said facility/ arrangements will be available until member is beneficial owner of the bungalow/ units. The member be informed accordingly."

14. The above stipulation in a way suggest that whatever facility or rights were given to him were also only to the present disputant and he was not allowed to assign or dispose of the said rights. So, this also indicates that extra premium was in fact not recovered for extra facility and/or it was not voluntary. What is more to be noted is that clause-38(ix) of the Bye-laws of the Co-operative Housing Society says :-

> **" 38. Notice of transfer of shares and interest in the capital/ property of the society.**
> (e) The Transferor/Transferee shall submit following documents and make the compliance as under :-
>
> (i) application for transfer of his shares

and interest in the capital/ property of the society, in the prescribed form, along with the share certificate.

(ii) application for membership of the proposed transferee in the prescribed form:

(iii) resignation in the prescribed form :

(iv) stamp duty paid agreement;

(v) valid reasons for the proposed transfer;

(vi) Undertaking to discharge all the liabilities to the society by transferor ;

(vii) Payment of the transfer fee of Rs.500/-

(viii) remittance of entrance fee of Rs.100/- payable by the proposed transferee;

(ix) Payment of amount of premium at the rate to be fixed by the general body meeting but within the limits as prescribed under the circular, issued by the Department of Co-operation/Government of Maharashtra from time to time.

No additional amount towards donation or contribution to any other funds or under any other pretext shall be recovered from transferor or transferee.”

15. So, it is very clear that having noticed that under the pretext of donation or contribution to any other fund societies are recovering more amount towards transfer premium this specific provision has been made. If we take into consideration the entire evidence and circumstances on record then I have no hesitation to hold that under the pretext of contribution for additional facilities the petitioner-society has recovered much extra amount towards transfer premium. So, both the Courts below have rightly held that the Petitioner-society has recovered extra transfer premium from the present Respondent-original disputant. Order passed by the President, Maharashtra Co-operative Appellate Court directing the Petitioner-Society to refund the extra premium recovered from the disputant with 6% interest is legal and valid. There is no necessity to interfere with the said order in this Writ Petition.

Hence, the Writ Petition has to be rejected.

Rule stands discharged.

(S.R. SATHE,J.)